

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
FOR MONTGOMERY COUNTY, MARYLAND

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PETITION OF KELLY A. TRIPPE & *
STEVEN D. AITKEN for a special exception for *
an attached accessory apartment on property *
located at 4107 Maryland Avenue, Bethesda, *
Maryland *

OZAH Case No. AA-14-05

Kelly A. Trippe *
For the Petition *

C. Ivan Eloisa *
Steve Morris *
Department of Housing and *
Community Affairs *

Before: Tammy J. CitaraManis, Hearing Examiner

HEARING EXAMINER'S REPORT AND DECISION

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I. STATEMENT OF THE CASE

Petition AA-14-05 was filed June 27, 2014. Petitioners, Kelly A. Trippe and Steven D. Aitken, seek approval of a special exception to allow an attached accessory apartment in accordance with Zoning Ordinance §§ 59-G-200.6 and 59-A-6.20 on property located at 4107 Maryland Avenue, Bethesda, Maryland in the R-60 Zone. The property is further described as Lots 72, 71 and Part of Lot 6, Block 5, of the Brookmont Subdivision, (Tax Account Number 0044867).¹ Exhibit 1. The accessory apartment will be located in the basement of the main dwelling which has been a registered living unit (RLU) since 1992 (Registration No.: 36324). Exhibit 4 and 42.

This case arises from a Referral Notice from the Department of Housing and Community Affairs (DHCA) dated December 13, 2013, denying Petitioners application for a Class III Accessory Apartment License filed November 24, 2013 (Rental License). Exhibits 2 and 3. The application was denied because the property did not have a driveway. As a result, the property did not meet the minimum on-site parking requirement under the licensing provisions found in Section 29-19 of the Montgomery County Code.² In order to deviate from the minimum parking requirement, Petitioners filed for a special exception for an accessory apartment pursuant to §§ 59-G-200.6 and 59-A-6.20 of the Zoning Ordinance. Exhibit 1.³

Under the provisions of Zoning Ordinance, § 59-G-1.12, the Hearing Examiner is authorized to hear and decide this type of petition. On July 25, 2014, the Office of Zoning and

¹ The property is jointly owned by Kelly Trippe and Steven Aitken. Exhibits 13(a)-(b) and 18. Kelly Trippe submitted and signed the Petition (Exhibit 1). Steve Aitken submitted an Affidavit consenting to the Petition with the following provision: "I hereby affirm that all statements and information contained in or filed with the petition, including all testimony, representations, exhibits of record presented in support of the petition are true and correct, and I agree to be bound by all conditions of approval." Exhibit 52.

² The term "on-site parking" is also referred to and is the same as "off-street parking."

³ This petition is reviewed under the 2004 Zoning Ordinance (Chapter 59) because the application was filed prior to October 30, 2014, the effective date for the new Zoning Ordinance. 2014 Zoning Ordinance, §7.7.1.B. Unless otherwise specifically stated, all citations herein are to the 2004 Zoning Ordinance. Exhibit 39, p. 2.

Administrative Hearings (OZAH) issued a notice that the public hearing would be held before the Hearing Examiner on Thursday, November 6, 2014. Exhibit 22. Based on information from Technical Staff that there was an approved accessory apartment less than 300 feet from the proposed accessory apartment, Petitioners amended the petition on October 24, 2014, to include a request to deviate from the minimum distance requirements from an existing accessory apartment pursuant to Section 59-A-6.20(b)(1)(B). Exhibit 25.

Technical Staff advised Petitioner that the property did not meet the seven-foot side yard setback on the south side as required by the 1928 Zoning Ordinance in the R-60 Zone. Thus, a variance of one-foot from the seven-foot side yard setback from the Board of Appeals was required as a condition of approval. Exhibit 23. To allow time for Petitioners to file for and obtain a variance, Petitioners' request to postpone the November 6, 2014, public hearing was granted in a Notice of Postponement of Public Hearing dated October 30, 2014. Exhibits 24-32. The public hearing was rescheduled for January 30, 2015, in a Notice of Rescheduled Public Hearing dated December 15, 2014. Exhibit 38.

Petitioners filed for a variance from the side yard setback with the Board of Appeals (Case No. A-6447) and a Notice of Hearing was issued November 26, 2014. Exhibit 36. In an Opinion adopted January 7, 2015 (effective February 5, 2014), the Board of Appeals granted Petitioners' request for a variance of one-foot from the seven-foot side yard setback required by Section III(c)3 of the 1928 Zoning Ordinance. Exhibit 43.

Technical Staff of the Montgomery County Planning Department, in a report dated January 2, 2015, recommended approval of the special exception, with five (5) conditions (Exhibit 39).⁴ A Housing Inspector from DHCA inspected the property on January 29, 2015.

⁴ The Technical Staff report is frequently quoted and paraphrased herein. The Technical Staff Report was received January 7, 2015. Exhibit 39.

Housing Code Inspector Ivan Eloisa reported his findings in a memorandum dated January 30, 2015. Exhibit 42.

The hearing went forward as scheduled on January 30, 2015. Petitioner Kelly Trippe appeared *pro se* and executed an Affidavit of Posting. Exhibit 41. Mr. Eloisa was present on behalf of DHCA and submitted his inspection report which Petitioners did not receive until the morning of the hearing. In order to allow Petitioners sufficient time to review and consider options necessary to comply with the findings of the housing inspection report, Petitioners' request to continue the hearing to February 26, 2015, was granted. T. 21-26. The February 26, 2015, public hearing was postponed due to inclement weather. Exhibit 44. Based on Petitioners' availability and agreement, the hearing was rescheduled for March 23, 2015, in a Notice of Continuation of Public Hearing dated March 6, 2015. Exhibits 45 and 47.

The March 23, 2015, public hearing went forward as scheduled. Petitioner Kelly Trippe appeared *pro se* and submitted an Affidavit of Steven D. Aitken and two alternate modified floor plans for DHCA approval. Exhibits 52 and 53(a)-(b). Ms. Trippe testified in support of the petition and accepted and adopted the findings and conclusions in the Technical Staff report as her own evidence of record and agreed to comply with the conditions of approval. Exhibit 39; T. 7. Housing Inspector Steve Morris was present and testified on behalf of DHCA because Mr. Eloisa was unable to attend the hearing.

The record was held open until April 2, 2015, to give time for the Court Reporter to produce the hearing transcript and to receive a follow-up report from Mr. Eloisa confirming his review and approval of both floor plans submitted at the hearing. The hearing transcript and follow-up report from Mr. Eloisa were timely received into the record which closed as scheduled on April 2, 2015. Exhibit 54. The Hearing Examiner subsequently reopened the

record by Orders dated April 28, 2015, and May 7, 2015, to receive current information regarding the actual number of special exception accessory apartments located less than 300 feet from the proposed use and within the general neighborhood. The record closed the same day on April 28, 2015, and again on May 7, 2015. Exhibits 55-60. There was no opposition (written or witnesses present at any of the hearings) to this special exception petition.

Based on a thorough review of the entire record, and for the reasons stated herein, the Hearing Examiner concurs with Technical Staff's recommendation that the petition meets all of the statutory requirements. The Hearing Examiner finds that there is adequate on-street parking to grant Petitioners' request to deviate from the minimum on-site parking requirements pursuant to Section 59-A-6.20(b)(1)(A). Further, updated records from the Board of Appeals confirms that there are no approved accessory apartments less than 300 feet from the proposed use.⁵ Accordingly, Petitioners' request to deviate from the minimum distance requirement pursuant to Section 59-A-6.20(b)(1)(B), is dismissed as moot. With the variance of one-foot from the seven-foot side yard setback requirements, the Petition meets the applicable development standards for the R-60 Zone.

Therefore, the Hearing Examiner concludes that the special exception be granted, subject to the conditions set forth in Section V of this Report and Decision.

II. FACTUAL BACKGROUND

A. The Subject Property

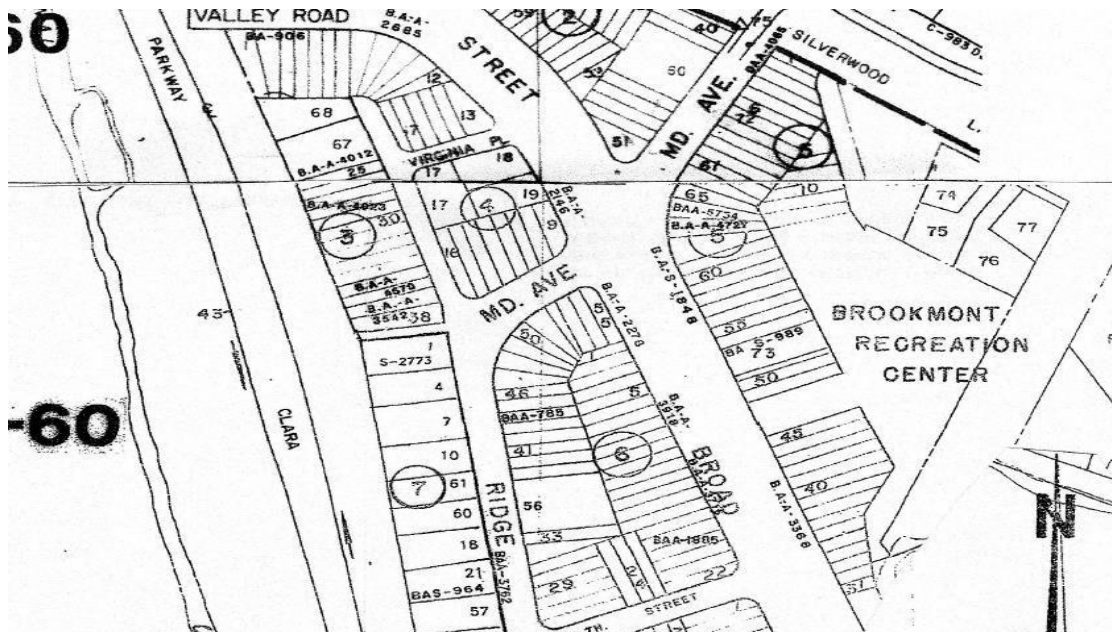
The subject property is located at 4107 Maryland Avenue, Bethesda, in the Brookmont Subdivision, a single-family residential neighborhood zoned R-60 and located within the

⁵ The special exception accessory apartment located at 6425 Broad Street (BAS-1848- approved May 7, 1991) was revoked as abandoned by Resolution of the Board of Appeals adopted February 6, 2013 (Effective date of Resolution, April 8, 2013). Exhibit 56.

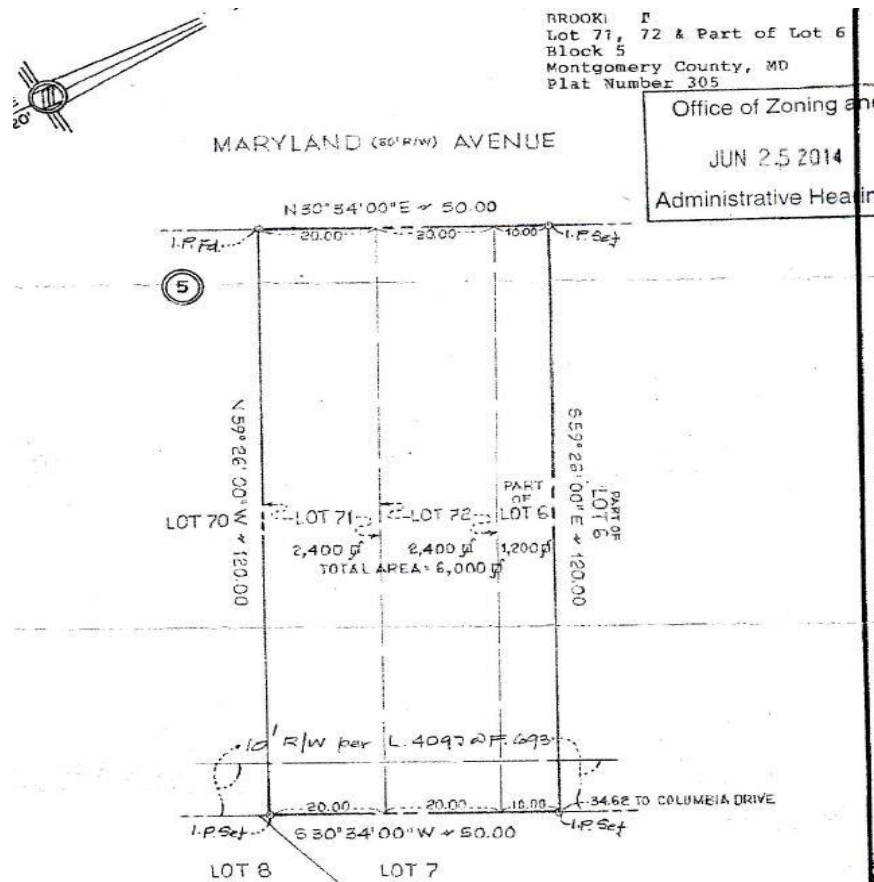
boundaries of the *1990 Bethesda Chevy-Chase Master Plan*. The property is located on the east side of Maryland Avenue which Staff reports is “a two-lane secondary residential public roadway measuring approximately 32 feet wide with an ultimate 60 foot right-of-way [and] four-foot wide concrete sidewalks along both sides of the street.” Exhibit 39, p. 5.

The interior lot, comprised of two and a half lots (Lots 71, 72 and part of Lot 6), is approximately 6,000 square feet in size and rectangular in shape. The lot is flat in the front with a downward slope towards the rear of the property. The property is approximately 200 feet south of the intersection of Maryland Avenue with MacArthur Boulevard and north of the intersection of Maryland Avenue with Broad Street. An unpaved road to the north provides access to the Brookmont Recreation Center which is located the behind the property to the east.

The Zoning Map of the area and survey for the property are shown below and on the following page (Exhibits 8-9).



Zoning Map Ex. 9



Technical Staff reports that the property is well maintained, landscaped and is one of five properties on Maryland Avenue that does not have a driveway. The lot is improved with a two-story single-family dwelling built in 1933. The dwelling is approximately 2,506 square feet in size and includes an addition on the southeast corner of the dwelling, a covered porch, deck and flagstone patio to the rear. A picket fence surrounds the perimeter of the property and a flagstone walkway from the front sidewalk provides access to the main dwelling. A stone path from the front walk along the south side of the property provides access to the rear patio and separate accessory apartment entrance.

Petitioners provided the following photographs of the front, side and rear views of the property, shown on the next page (Exhibits 17(a) and (b)):



Front of house



Side of house

EXHIBIT NO. 17(b)
REFERRAL NO. AA-14-05



Dwelling: Front and side views– Ex. 17(b)
Rear view- Ex. 17(a)

B. The Surrounding Neighborhood

Technical Staff advises that the general neighborhood consists of a mix of single-family dwellings located in the R-60 Zone. Technical Staff defined the general neighborhood surrounding the subject property as “bound[ed] by MacArthur Boulevard to the north, the

Georgetown Branch to the east, federal parkland to the south and Clara Barton Parkway to the west.” Exhibit 39, p. 4. Having no evidence to the contrary, the Hearing Examiner accepts Technical Staff’s definition of the general neighborhood. Technical Staff provided an aerial photograph of the area and the neighborhood boundary has been drawn to include any nearby properties that may be affected by a potential increase in density or traffic, shown below (Exhibit 39, p. 4):



Neighborhood Map (boundary in orange, subject site in pink)

Technical Staff reports (Exhibit 39, p. 9):

There are two approved special exceptions in the defined neighborhood. Both special exceptions are for accessory apartments. The proposed apartment will not increase the intensity or scope of special exception uses sufficiently to affect the area adversely. The two existing special exception uses are not distinguishable from the other one-family dwelling units in the neighborhood.

The proposed use is a residential use by definition and as such, the special exception will not alter the residential nature of the area. The proposed use will not be visible to the surrounding properties and is consistent with the master plan recommendations for retaining the one-family detached character throughout Bethesda.

The two special exception accessory apartments are identified as BAS-[989] (6417 Broad Street, approved September 12, 1984) and BAS-1848 (approved May 7, 1991).⁶ The accessory apartment located at 6425 Broad Street (BAS-1848) is less than 300 feet from the proposed apartment. Staff provided an aerial photograph with the 300 foot radius (red circle) from proposed use (pink box) and existing apartment (brown box).⁷ Exhibit 39, p. 14.



Records obtained after the hearing reveal that the Board of Appeals revoked BAS-989 in 1986 and BAS-1848 in 2013. Exhibits 56 and 58. These records also reveal that a special exception for an accessory apartment located at 6430 Ridge Road (S-2773) was approved in

⁶ Based on a review of the zoning map for this area and records from the Board of Appeals, BAS-969 is an accessory apartment located in Takoma Park. Exhibit 9 and 58(b). The Hearing Examiner believes Technical Staff intended to refer to an accessory apartment located at 6417 Broad Street (BAS-989) as shown on the zoning map. However, Board of Appeals records show that BAS-989 was revoked in 1986. Exhibit 58(a).

⁷ As a result, Petitioner amended the petition to request to deviate from the minimum distance requirement to any accessory apartment pursuant to Section 59-A-6.20. Exhibit 25.

2011. There is sufficient evidence to find that this accessory apartment is more than 300 feet from the proposed use. Exhibit 59. Thus, there are no approved accessory apartments located within 300 feet of the proposed use and only one approved special exception accessory apartment (S-2773) located within the general neighborhood boundary.

For the reasons stated, and especially considering there is only one approved accessory apartment located within the general neighborhood, the Hearing Examiner concurs with Technical Staff and finds that the proposed accessory apartment will not increase the scope or intensity of special exceptions in the neighborhood so as to adversely affect the area or change the residential character of the neighborhood.

C. The Master Plan

The subject property lies within the geographic area covered by the *Bethesda Chevy Chase Master Plan*, approved and adopted in April 1990 (Master Plan). Technical Staff described the neighborhood as a mix of one-family detached homes built in the 1920's and 1930's located in the R-60 Zone. Staff noted that while the Master Plan does not have specific recommendations pertaining to this property, it does reconfirm the R-60 zoning and "[t]he proposed use reinforces the Plan's recommendation of retaining the one-family detached character in Bethesda." Thus, Technical Staff found the proposed special exception for an accessory apartment is consistent with the Master Plan. Exhibit 39, p. 5.

The Hearing Examiner would add that the Master Plan clearly supports "expanding choices of housing types by provision of accessory apartments." Master Plan, p. 33. The Master Plan recommends that "[a]ny modification or addition to an existing building to accommodate a special exception use should be compatible with the architecture of the

adjoining neighborhood and should not be significantly larger than nearby structures.” Master Plan, p. 31.

The proposed use will be located in the basement of the existing single-family dwelling and will not require an expansion or addition to the main dwelling. The separate entrance is located in the rear of the dwelling which is above-grade and under the covered porch off the first floor of the main dwelling. The entrance is not visible from the street. Technical Staff found there is adequate on-street parking to accommodate the proposed use and main dwelling and the exterior lighting is residential in character with no adverse effects on the neighborhood. Exhibit 39, p. 6.

The only external modifications necessary to accommodate the proposed use under the alternate modified floor plans will be to either the side or rear of the above-grade foundation.⁸ The proposed modifications include the installation of an egress window on the south side of the dwelling (Floor Plan 1) or the enlargement of an existing full-size window to create a second exterior door (Floor Plan 2). Exhibits 53(a)-(b). The alternate floor plans are shown on pages 19 and 20 this Report and Decision. Both Housing Inspectors, Mr. Eloisa and Mr. Morris, reviewed and agreed that both floor plans as proposed will meet the requirements of the building code for an accessory apartment. Exhibit 54; T. 18-23 (3/23/15).

The Hearing Examiner finds that the proposed modifications under both floor plans by their very nature, use and location are compatible with the inherent features of a single-family dwelling. The egress window (Floor Plan 1) will be typical of an above-grade basement window and will be similar in size and style as the existing windows on the side of the dwelling. The second exterior door (Floor Plan 2) will be created from an existing full-size window and

⁸ Petitioner submitted the alternate floor plans based on the findings of the housing inspection report dated January 29, 2015. Exhibit 42.

located in-line with and under the deck stairs. The door will be typical of a rear-entry door for basement with little or no visual impact to the residential character of the dwelling given its sheltered location and creation from an existing window. Thus, any visual impact from either the egress window or the change in use of the existing window to an exterior door will be minimal, if at all noticeable to the adjacent properties and will be consistent with the residential character of the dwelling.

The Hearing Examiner finds that the modifications proposed under both floor plans are compatible with a single-family dwelling and will not alter or change the residential character of the dwelling or the surrounding neighborhood. Therefore, the Hearing Examiner agrees with Technical Staff that the “proposed use reinforces the Plan’s recommendation of retaining the one-family detached character in Bethesda.” Exhibit 39, p. 5.

For the reasons stated, the Hearing Examiner concurs with Technical Staff and finds that the proposed use is consistent with the *Bethesda Chevy Chase Master Plan*.

D. The Proposed Use

The proposed use will be located in the finished basement of an existing single-family dwelling. Petitioners are seeking approval to change the use of the basement apartment from a RLU to an accessory apartment. Exhibit 4. Petitioners intend to maintain the accessory apartment for short-term rentals and accommodate visiting scholars, artists and other guests to their home. The apartment is currently occupied by Petitioners’ son. Exhibit 2(b); T. 16-18.

Technical Staff reports (Exhibit 39, p. 4):

A separate entrance to the proposed use is located at the rear of the house and is distinct from the entrance to the main dwelling. The proposed use has the appearance of a typical rear entry into a one-family home. The accessory apartment entrance will not detract from the appearance of the neighborhood. Adequate lighting, residential in character, is located adjacent to the apartment’s entrance door. A slate path leads from the

front of the house along the side yard to the rear of the house and to the above-grade entrance of the proposed accessory apartment.

Technical Staff provided the following photographs of the path and accessory apartment entrance (Exhibit 39, p. 5):



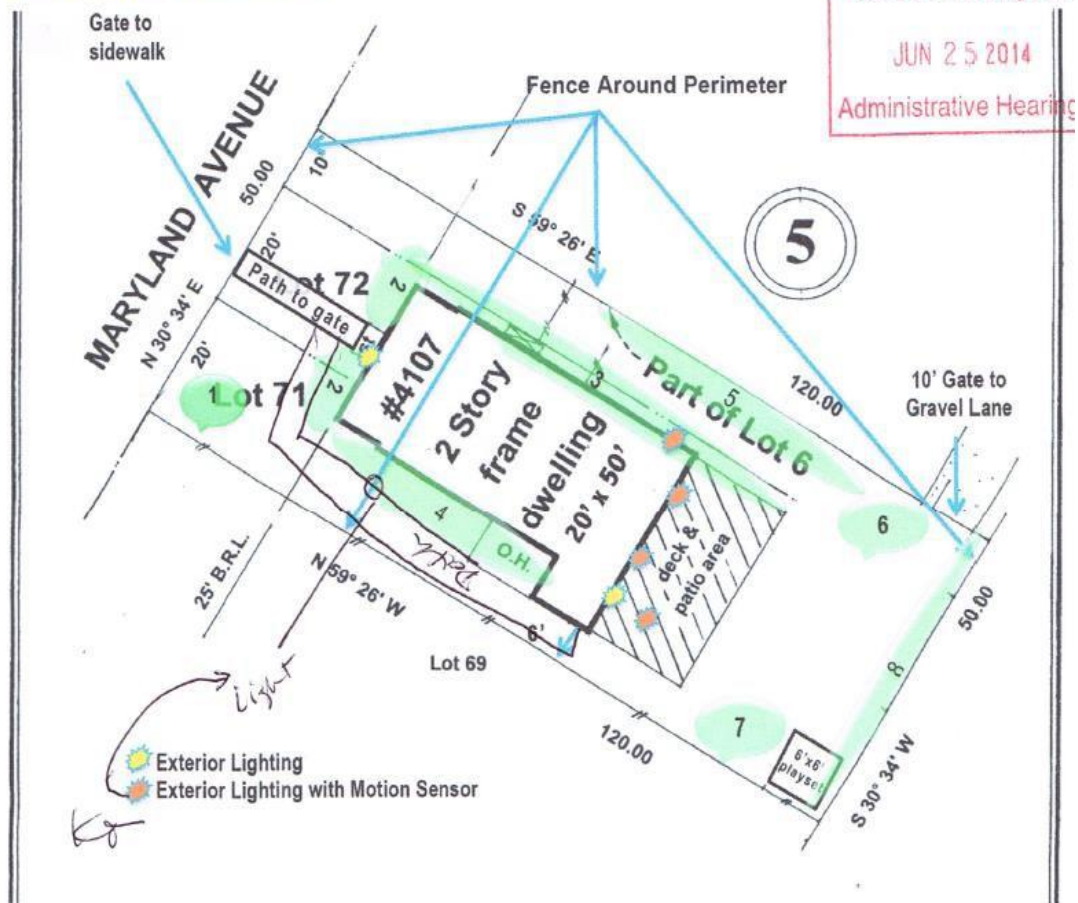
Path to accessory apartment



Entrance to accessory apartment

Petitioners modified the Landscape and Exterior Illumination plan (Landscape Plan) to show the location of the path and existing exterior lighting on the front, side and rear of the dwelling, as shown on the next page (Exhibit 15). The exterior lighting includes a porch light for the main dwelling and the accessory apartment. The path to the accessory apartment entrance will be illuminated by a motion sensor light mounted on the side of the dwelling. Three motion sensor lights under and on the corner of the deck will provide additional lighting for the patio area and accessory apartment entrance. Exhibit 12; T. 24-27. Mr. Morris noted that the existing lighting under the deck and adjacent to the existing exterior door will provide adequate lighting for the second exterior door proposed under the second floor plan. T. 26.

1. Plat drawing showing size, type and location of existing trees, landscaping, screening, and exterior illumination



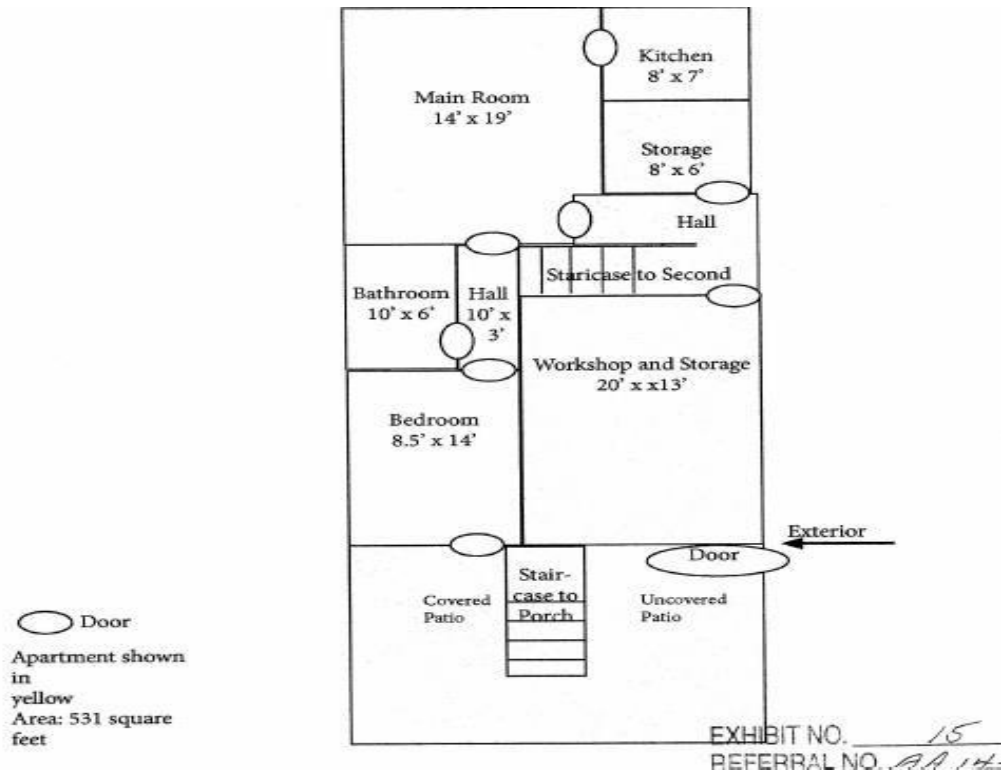
Landscape and Lighting Plan – Ex. 12

Technical Staff found that “[t]he use will cause no objectionable illumination or glare as the provided lighting is residential in character.” Exhibit 39, p. 9. The Hearing Examiner agrees with Technical Staff and so finds.

Based on the dimensions provided on the original floor plan (Exhibit 15), Technical Staff reports that the accessory apartment is approximately 531 square feet in size and includes one bedroom, a full bath, hall, main room and kitchen. Exhibit 39, pp. 4 and Attachment B.

The original floor plan and photographs of the apartment as it currently exists are shown below and on the next page (Exhibits 15, 16(a) - (b) and 17(a)):

Existing Floor Plan – Exhibit 15.



Entrance to apartment into bedroom (8.5'x14').
Exhibit 17(a).

Apartment interior- Exhibits 16(a)-(b)



Bedroom with outside exit door and two windows.



Dining Area



Bathroom (shower to right)

EXHIBIT NO. 16(b)
REFERRAL NO. AD-14-05



Kitchen

Photos of Apartment Interior



Living room

EXHIBIT NO. 16(a)
REFERRAL NO. AD-14-05

DHCA inspected the property on January 29, 2015, and Housing Inspector Ivan Eloisa reported his findings in a memorandum dated January 30, 2015. In his report, Mr. Eloisa confirmed that the unit has been a RLU since 1992 and the registration for the RLU was transferred to the Petitioners in 2008. The substance of his report is set forth below (Exhibit 42):

The property known as 4107 Maryland contains approximately 6,000 SF of land and the dwelling is approximately 580 SF. The issues regarding Accessory Apartment standards are as follows:

1. Bedrooms shall not constitute the only means of access to the other bedrooms or habitable spaces and shall not serve as the only means of egress for other habitable spaces.
2. The minimum total glazed area for every habitable space shall be 8 percent of the floor area of such room.

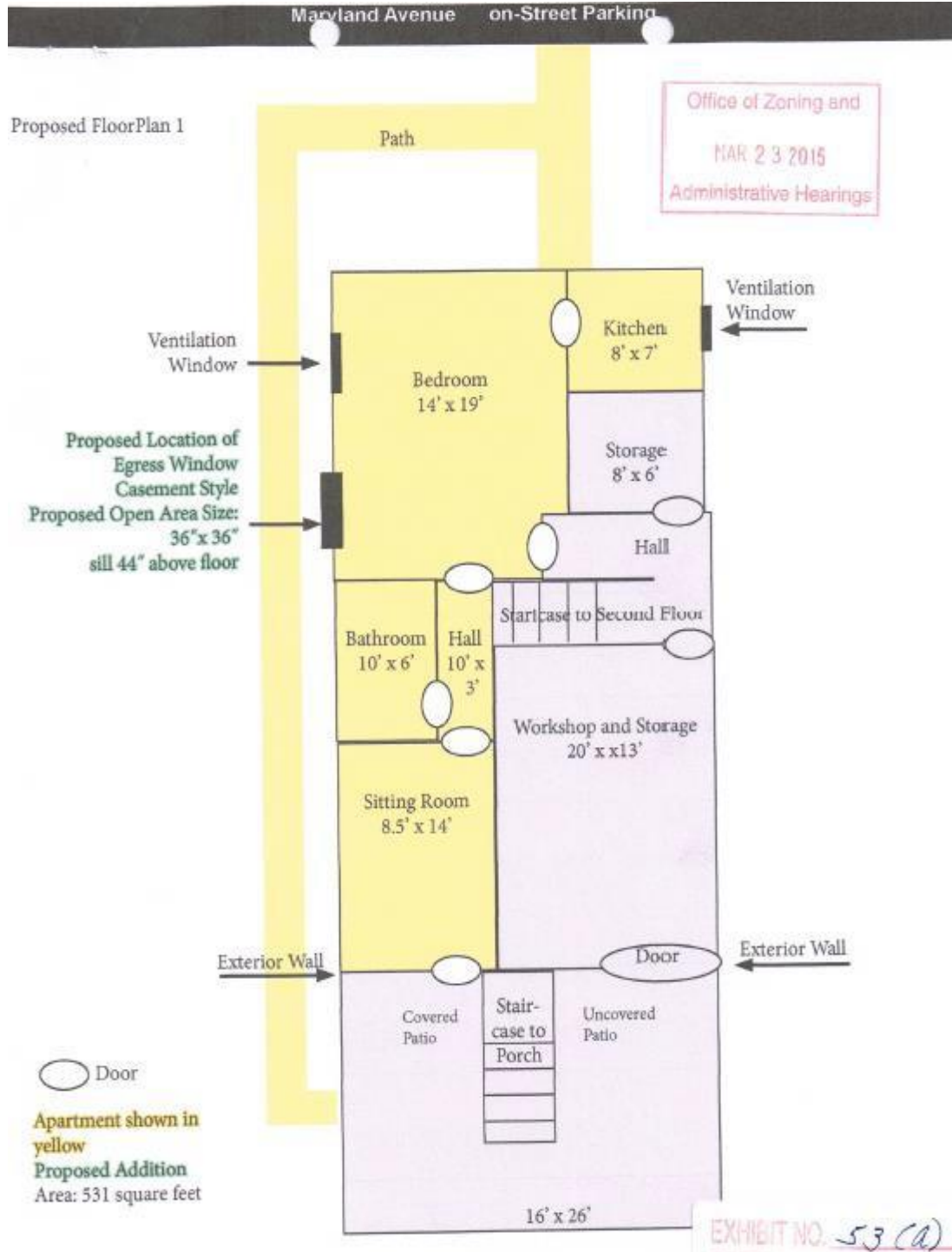
The room labeled Main Room does not meet the minimum glazing requirements of 8 percent of the floor area. A solution would be to enlarge the existing window or install another window in order to meet the minimum glazing requirements as well as the egress requirement to make it the sleeping area.

An egress window in the basement area shall be at least five (5) square feet in net clear opening [and] must be openable without the use of a tool with a minimum net clear height of 24 inches and a minimum net clear width of 20 inches, with the bottom of the opening not more than 44 inches above the floor.

You must also contact the Department of Permitting [Services] to determine if a building permit is required for enlarging the window or installing a second window. The room labeled as a Bedroom cannot be used for sleeping purposes as a bedroom shall not serve as the only means of egress for other habitable space.

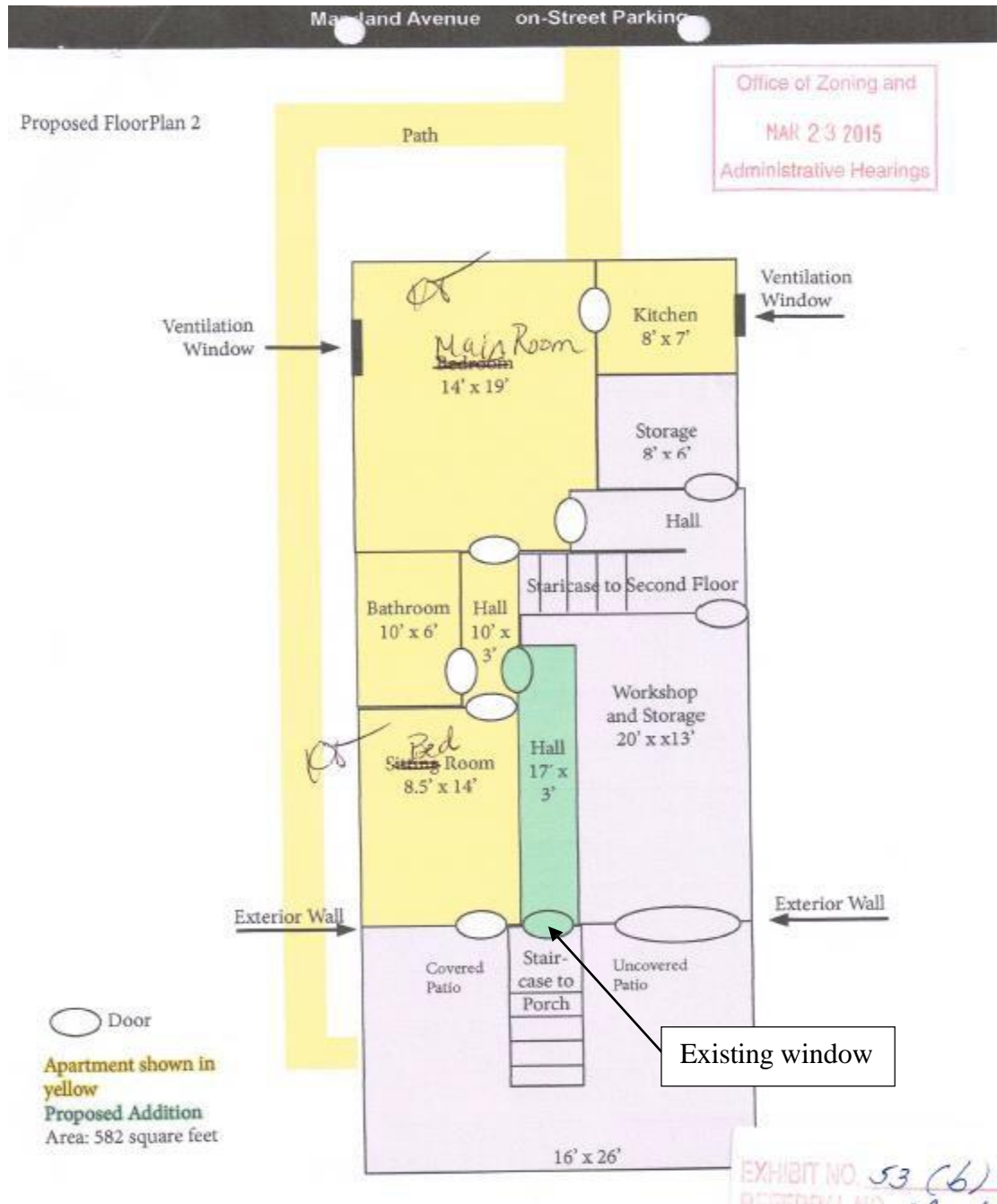
Petitioners submitted alternate modified floors plans based on the findings of the housing inspection report. T. 21-26 (3/23/15). The first floor plan proposes to reverse the use of the two rooms to relocate the bedroom towards the front of the dwelling and main room at the rear (8.5'x14') with the exterior door. This would require the installation of an egress

window in the bedroom as shown below on Proposed Floor Plan 1 (Exhibit 53(a)):



Proposed Floor Plan 1 – Ex. 53(a)

The second floor plan proposes to maintain the location of the two rooms as shown on the original floor plan (Exhibit 15) with the addition of a hallway and second exterior door as shown below on Proposed Floor Plan 2 (Exhibit 53(b)):



Proposed Floor Plan 2- Ex. 53(b)

The space for the new hallway (17'x 3') will be taken from the woodshop area and connect to the existing hallway located in the middle of the unit.⁹ This will provide dedicated access into the accessory apartment without going through the existing bedroom (8.5'x14'). The existing exterior door into the bedroom will provide the required emergency egress. An existing full-size window located to the right of the existing door and under the deck, shown below in a photograph provided by Petitioners, will be enlarged to create an exterior door into the new hallway (Exhibit 62(b)); T. 12-14 (3/23/15).¹⁰



Exterior window to be enlarged to create exterior door into new hallway as shown in green on Floor Plan 2. Exhibit 62(b)

⁹ Based on DHCA's inspection and measurement of the unit (580 square feet), the hallway will add approximately 51 square feet for a total of 631 square feet for the unit under the second floor plan. Exhibits 42 and 53(b).

¹⁰ At the Hearing Examiner's request, Petitioners submitted these photographs after the record had closed on May 7, 2015. Accordingly, the Hearing Examiner hereby opens and closes the record to accept these photographs.

Based on advice from her contractor, Ms. Trippe testified that she prefers the second floor plan (Exhibit 53(b)) because it will likely be less expensive and easier to complete than the modifications proposed under the first floor plan (Exhibit 53(a)). T. 16-23 (3/23/15).

Housing Inspector Steve Morris testified that both floor plans as proposed comply with the minimum housing code requirements for an egress window and hallway. He also confirmed the minimum ceiling height is 84 inches, the amount required by the housing code. Exhibits 53(a)-(b); T. 18-20 (3/23/15)).¹¹

In a follow-up e-mail dated April 1, 2015, Mr. Eloisa provided his opinion on the two proposed floor plans as follows (Exhibit 54):

My supervisor and I have reviewed the two proposed floor plans submitted by the applicant, Kelly Trippe, and both would meet the egress requirements for habitability. I had a conversation with Ms. Trippe regarding the proposed plans and she is leaning towards the Proposed Floor Plan 2, which has a proposed addition of a hallway and exterior door. Ms. Trippe was informed that she would have to obtain a Department of Permitting building permit for the alteration.

The Hearing Examiner finds that the modifications as proposed in both floor plans are by their very nature, use and location compatible with the inherent features of a single-family dwelling. The egress window (Floor Plan 1) will be typical of an above-grade basement window and it will be similar in size and style as the existing windows on the dwelling and foundation. The second exterior door (Floor Plan 2) will be created by enlarging an existing full-size window which is located to the right of the existing exterior door and under the deck stairs. The door will be typical of a rear-entry door for a basement with little or no visual impact to the residential character of the dwelling given its sheltered location and creation from an

¹¹ Ms. Trippe testified that she believes the hallway will meet the minimum ceiling height requirement because the duct work in the workshop area is being reconfigured to install a new furnace. Petitioner was advised to confirm this with Mr. Eloisa prior to construction under the second floor plan. T. 22-23 (3/23/15).

existing window. Thus, any visual impact from either the egress window or the change in use of the existing window to an exterior door will be minimal, if at all noticeable to the adjacent properties.

The Hearing Examiner finds and concludes that the modifications proposed under both floor plans are compatible with a single-family dwelling and will not alter or change the residential character of the dwelling or the surrounding neighborhood.

E. Parking and Transportation

1. Parking:

For an accessory apartment use, Section 59-A-6.20(a) (C) requires Petitioner to provide one on-site parking space for the proposed use in addition to the one space required for the main dwelling. The property lacks a driveway and therefore does not meet the on-site parking requirements.

Section 59-A-6.20(b)(1)-(3) provides:

(b)(1) An attached or detached accessory apartment special exception may be filed with the Hearing Examiner to deviate from any permitted use standard regarding:

(A) number of on-site parking spaces; or

(B) minimum distance from any other attached or detached accessory apartment.

(2) To approve a special exception filed under Subsection (b)(1), the Hearing Examiner must find, as applicable, that:

(A) adequate on-street parking permits fewer off-street spaces; or

(B) when considered in combination with other existing or approved accessory apartments, the deviation in distance separation does not result in an excessive concentration of similar uses, including other special exception uses, in the general neighborhood of the proposed use.

(3) the Hearing Examiner may find that on-street parking is inadequate if:

(A) the available on-street parking for residents within 300 feet of the proposed accessory apartment would not permit a resident to park on-street near his or her residence on a regular basis; and

(B) the proposed accessory apartment is likely to reduce the available on-street parking within 300 feet of the proposed accessory apartment.

Technical Staff reports (Exhibit 39, p. 13):

The subject property does not contain a driveway. It is one of five residences located along the eastern side of this block of Maryland Avenue that do not contain either a driveway or a garage. Beyond the fifth house, there appear to be more residences with driveways and garages. Many of these residences appear to be newer residential construction than the subject site. Given the current size of the property, its 50 foot lot width and existing house placement on the lot, construction of a driveway on this property would not be practical or feasible and would significantly change the residential character of the surrounding neighborhood. A site visit revealed that adequate on-street parking is available within 300 feet of the subject site.

Technical Staff concluded that “[t]he addition of one extra vehicle under the proposed special exception use will not have an adverse effect on parking in the neighborhood.” Exhibit 39, p. 6. Based on an on-site visit (street only) of the property, Housing Inspector Steve Morris testified that there is adequate on-street parking to accommodate the proposed use and main dwelling without adversely affecting the availability of on-street parking for residents within 300 feet of the property. T.31.

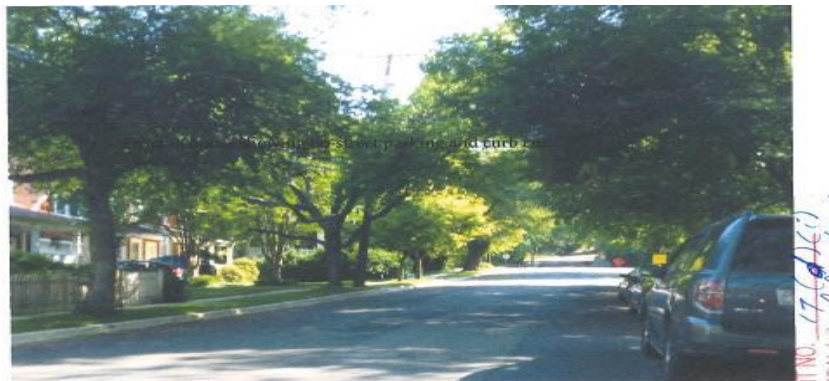
Ms. Trippe testified that she and her husband have never had any problems parking their two vehicles in front of their house. She noted that with the exception of four houses to the south of her property, the neighbors to the north and across the street generally do not park on the street because they have a driveway and a garage. The neighbors to the north use an unpaved right-of-way to access their rear garage and driveway. Further, she testified that there is ample unrestricted parking one block south of her property on Broad Street in both directions. She indicated that this area provides significant unrestricted parking for the

neighborhood. T. 8-11.

Petitioner provided the following photographs of the available parking in front of her house and along Maryland Avenue (Exhibit 17(c)-(d) (i)):



Parking in front of house



Parking in front of house



Parking in front of house

The Hearing Examiner concurs with Technical Staff that construction of a driveway on this property is not feasible or practical given the size and width of the lot and location of the house on the lot. Based on the evidence presented, the Hearing Examiner agrees with Technical Staff and the Housing Inspector and finds that there is adequate on-street parking to accommodate the proposed use and main dwelling without adversely affecting the availability of on-street parking for residents within 300 feet of the property. Therefore, the Hearing Examiner finds sufficient evidence to grant Petitioners' request to deviate from the on-site parking requirements in accordance with Section 59-A-6.20(b)(2)(A).

2. Transportation:

In addition to adequate on-street parking, Technical Staff reports the closest bus stop (e.g., Ride-On Route 23) "is approximately 150 feet north of the property at the corner of Maryland Avenue and MacArthur Boulevard." Exhibit 39, p. 6. Technical Staff found that the proposed use "will not have an adverse effect on the transportation network nor will it negatively impact pedestrian, bicyclist, or vehicular safety." *Id.*

Transportation Staff reported (Exhibit 39, Attachment C):

Master Plan Roadways/Bikeways

Neither the 1990 Approved and Adopted Bethesda Chevy Chase Master Plan nor the 2005 Countywide Bikeways Functional Master Plan recommend transportation improvements along the site frontage.

Local Area Transportation Review

Using trip generation rates included in the *Local Area Transportation Review (LATR) and Transportation Policy Area Review (TPAR) Guidelines*, the single-family dwelling on the property is estimated to generate one peak-hour trip during the weekday morning (6:30 a.m. to 9:30 a.m.) and evening (4:00 p.m. to 7:00 p.m.) peak periods. Using these guidelines, the accessory apartment is estimated to generate one additional peak-hour trip during each of the weekday peak periods. Since the existing house and accessory apartment together will generate fewer than 30 peak-hour trips, a traffic study is not required for the subject petition. As a result, the subject petition satisfies the LATR requirement of the APF test.

Transportation Policy Area Review (TPAR)

As noted above, the single-family detached unit and the accessory apartment on the property together will generate less than three peak-hour trips during the weekday morning and evening peak periods. Therefore, the subject petition is not subject to the TPAR requirements of the APF test.

Due to the small scale of the proposed use, the Hearing Examiner has no basis in this record to disagree with the finding of Technical Staff and therefore agrees that the accessory apartment satisfies the LATR and TPAR tests and will have no adverse impact on the area roadways and pedestrian facilities. Exhibit 39, p. 5. There being no evidence in the record to the contrary, the Hearing Examiner so finds.

F. Environmental Impacts

Technical Staff reported that the property is well-maintained and landscaped with several medium size trees that are in good health. Further, no new landscaping or plantings are proposed. Environmental Staff determined that the property is exempt from the Forest Conservation Plan requirements under Section 22A of the Montgomery County Code. Exhibit 11. Thus, Technical Staff found that “[t]here are no landscaping or environmental issues associated with this application.” Exhibit 39, p. 6. Based on this evidence, the Hearing Examiner agrees with Technical Staff and concludes that Petitioners’ request will have no adverse environmental impacts.

G. Community Response

There has been no response from the community, either positive or negative, to the subject petition.

III. SUMMARY OF THE HEARING

The hearing was opened as scheduled on January 30, 2015. Petitioner Kelly Trippe and Ivan Eloisa, DHCA Housing Inspector, were present. The hearing was continued to February

26, 2015, at Petitioners' request. The hearing was cancelled due to inclement weather and rescheduled for March 23, 2015. Ms. Trippe and DHCA Housing inspector Steve Morris were present at the March 23, 2015, hearing. There were no other witnesses or residents present at either hearing in support of or in opposition to the Petition. A summary of the testimony for both hearing dates is summarized in an appendix to this Report and Decision, which is incorporated herein.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards and conditions are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions and Petitioners have the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioners will have satisfied all the requirements to obtain the special exception with the recommended conditions. Exhibit 39. There was no community opposition to the proposed use.

Weighing all the testimony and evidence of record under a "preponderance of the evidence" standard (Code 59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use provided Petitioners comply with the recommended conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code Section 59-G-1.2.1 requires

consideration of the inherent and non-inherent adverse effects of the proposed use at the proposed location, on nearby properties and in the general neighborhood. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code Section 59-G-1.2.1. This provision specifies, “Inherent adverse effects alone are not a sufficient basis for denial of a special exception.” Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with an accessory apartment. Characteristics of the proposed accessory apartment that are consistent with the “necessarily associated” characteristics of an accessory apartment use will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with an accessory apartment use, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff identified the following inherent characteristics of an accessory apartment (Exhibit 39, p. 7):

1. the existence of the apartment as a separate entity from the main living unit but sharing a party wall,

2. the provision within the apartment of the necessary facilities, spaces, and floor area to qualify as habitable space under the applicable code provisions,
3. a separate entrance and walkway and sufficient exterior lighting,
4. sufficient parking,
5. the existence of an additional household on the site with resulting additional activity including more use of outdoor space and more pedestrian, traffic, and parking activity, and
6. the potential for additional noise.

The Hearing Examiner concludes that, in general, an accessory apartment has characteristics similar to a single-family residence with only a modest increase in traffic, parking, and noise that would be consistent with a larger family occupying a single-family residence. Thus, the inherent effects of an accessory apartment would include the fact that an additional resident (or residents) will be added to the neighborhood, with the concomitant possibility of an additional vehicle or two.

Technical Staff found that there are no non-inherent adverse effects arising from the proposed accessory apartment use. In support of this conclusion, Technical Staff found (Exhibit 39, p. 8):

Under the subject application, there are no adverse effects that will negatively impact the community above those necessarily inherent to an accessory apartment. The apartment will be located in the basement of the main dwelling and is not identifiable from the street. The accessory unit has its own separate entrance apart from the rest of the house. The apartment entrance appears typical of a rear entrance to a one-family house, as such it is difficult to distinguish it from any other neighborhood home. The entrance of the accessory apartment will be illuminated consistent with typical residential standards. On-street parking is permitted on both sides of Maryland Avenue and adequate on-street parking exists in the vicinity of this property. The accessory apartment's future tenant will not create adverse impact to existing parking conditions in the defined neighborhood.

The operational and physical characteristics of the proposed accessory apartment are consistent with the inherent characteristics of an accessory apartment use. There are no non-inherent adverse effects present in this case.

The Hearing Examiner agrees with Technical Staff's findings and conclusion.

However, the Hearing Examiner finds the narrow lot width to be an unusual characteristic of the site that should be considered a non-inherent adverse effect. The existing single-family dwelling was built in 1933 under the standards of the 1928 Zoning Ordinance which provides for a 7 foot side-yard setback and 50-foot lot width at the front building line. The dwelling is setback 6 feet from the south side yard and did not meet the 7 foot side-yard setback. Petitioner applied for and was granted a variance of one-foot from the 7 foot side yard setback by the Board of Appeals on January 7, 2015. Exhibit 43.

The lot size, narrow width and location of the existing dwelling eliminates the possibility of Petitioners adding a driveway to meet the on-site parking requirements. According to Technical Staff the addition of a driveway “would not be practical or feasible and would significantly change the residential character of the surrounding neighborhood.” Exhibit 39, p. 13. However, Technical Staff found that there is adequate on-street parking along both sides of Maryland Avenue and south of the proposed use. The unrestricted parking is due in part to the fact that the newer homes on the street (north and across the street from the proposed use) were constructed with both a garage and driveway. Thus, only five of the homes on Maryland Avenue do not have a driveway. T. 30.

As a result, Technical Staff found that there was adequate on-street parking to support Petitioners’ request to deviate from the on-site parking requirements as the proposed use will not reduce the availability of on-street parking within 300 feet of the property for other residential uses. Exhibit 39, p. 13. Housing Inspector Steve Morris, based on a separate on-site visit, agreed with Technical Staff’s conclusion that there is adequate on- street parking without adversely affecting the parking in the neighborhood. T. 31 (3/23/15).

Despite the inability to provide on-site parking, the evidence presented indicates that

there is adequate on-street parking to accommodate the proposed use and main dwelling without reducing the availability of on-street parking for other residential uses within 300 feet of the property. Therefore, the Hearing Examiner finds that the narrow lot does not create any adverse effects in this case to warrant denial of the special exception request for this reason.

The Hearing Examiner finds that the relevant site and operational characteristics of the proposed use are consistent with the inherent characteristics identified for an accessory apartment use. The proposed accessory apartment is located in the basement of an existing single-family dwelling with a separate rear entrance that is typical of a rear entry into a single-family dwelling. It is not visible from the street and the lighting for the path and at the rear entrance will be residential in character. The proposed exterior modification to install an egress window (Floor Plan No.1) or the enlargement of an existing window to create a second exterior door into a new hallway (Floor Plan No. 2) will be compatible with and will not change the residential character of the home and neighborhood. Occupancy will be limited to two adults with minimal impact on parking, traffic or noise associated with the additional occupants to a single-family dwelling.

Based on the evidence in this case, and considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner concurs with Technical Staff and finds that there are no non-inherent adverse effects from the proposed use.

B. General Standards

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report and the Petitioners' documentary evidence and testimony provide sufficient evidence that the general standards would be satisfied in this case, as outlined below.

Section 59-G-1.21. General conditions:

- (a) *A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

- (1) *Is a permissible special exception in the zone.*

Conclusion: An accessory apartment is a permissible special exception in the R-60 Zone, pursuant to Code § 59-C-1.31.

- (2) *Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed use complies with the standards and requirements set forth in Zoning Ordinance § 59-G-2.00.6, for an accessory apartment use as outlined in Part C, below.

- (3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny a special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The subject property is covered by the *Bethesda-Chevy Master Plan*, approved and adopted in April 1990. For reasons set forth in Part II.C of this Report and Decision, the Hearing Examiner finds that the planned use, an accessory apartment in a one-family detached home located in the R-60 zone, is consistent with the goals and objectives of the *Bethesda-Chevy Chase Master Plan*.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: The evidence demonstrates that the neighborhood is characterized by one-family detached residential uses. The accessory apartment will be located in the basement of an existing one-family dwelling which has been in use as a RLU since 1992 and occupied by a family member. The nature and character of the use remains residential. Since occupancy is limited to no more than two individuals, the change in use from a RLU to an accessory apartment will have only a minimal impact on population density and intensity of use. There is adequate on-street parking to accommodate the proposed use and main dwelling without adversely affecting the available on-street parking for residents within 300 feet of the property. The modifications proposed under the alternate floor plans are compatible with and will not change the residential character of the dwelling or neighborhood. According to Transportation Staff, the proposed special exception will not have an adverse effect on vehicular traffic or pedestrian access or safety in the immediate area. There is one other approved accessory apartment (S-2773) use within the Staff-defined neighborhood which is more than 300 feet from the proposed use. The Hearing Examiner concurs with Technical Staff's finding that the addition of the proposed accessory apartment to the neighborhood will not be excessive or change the residential character of the neighborhood. Based on these facts and the other evidence of record, the Hearing Examiner finds and concludes that the proposed use will be in harmony with the general character of the surrounding residential neighborhood.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of*

any adverse effects the use might have if established elsewhere in the zone.

Conclusion: There is no evidence in this case that the use as proposed will have a detrimental impact on surrounding properties or the general neighborhood. For the reasons set forth in the previous answer, the Hearing Examiner agrees with Technical Staff and finds that the special exception will not be detrimental to the use, peaceful enjoyment, economic value, or development of the surrounding properties or the defined neighborhood, provided that the special exception is operated in compliance with the listed conditions of approval set forth in Part V. The Hearing Examiner finds that this standard has been met.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The proposed use is a residential use and similar to its current use as a RLU. The use will be indoors and occupancy will be limited to no more than two individuals over 18 years of age. Thus, the nature of the use will remain residential with the possibility of an additional occupant and minimal increase in activity or noise. The exterior lighting is residential in character. Based on the evidence, the Hearing Examiner concurs with Technical Staff and finds that the proposed use will not cause objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: Based on updated records from the Board of Appeals, there is one approved special exception (S-2773) located within the boundaries of the general neighborhood. It is an accessory apartment located at 6430 Ridge Road and was approved March 17, 2011. Exhibit 59. An accessory apartment is by definition a residential use. In this case, the proposed and existing accessory apartments are located in the rear of the dwelling. The accessory apartments are not visible from the street or distinguishable from the other one-family dwellings in the neighborhood. The proposed accessory apartment is more than 300 feet from the existing accessory apartment and therefore, will have no impact on the available on-street parking for the existing accessory apartment. Based on this information, the Hearing Examiner agrees with Technical Staff and finds that the proposed special exception will not increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: There is no evidence in this case that the use as proposed will adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area. There is adequate on-street parking and sidewalks on both sides of the street. The walkway to the rear of the dwelling will be illuminated with motion sensor exterior lighting for safe access to the accessory apartment entrance. For the reasons set forth in the previous answer, the Hearing Examiner agrees with Technical Staff and finds that the special exception will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*
- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*
- (B) *If the special exception:*
- (i) does not require approval of a new preliminary plan of subdivision; and*
 - (ii) the determination of adequate public facilities for the site is not currently valid for an impact that is the same or greater than the special exception's impact,*
- then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.*

Conclusion: The special exception sought in this case will not require approval of a preliminary plan of subdivision. Therefore, the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the applicable Growth Policy standards. These standards include Local Area Transportation Review (LATR) and Transportation Policy Review Area (TPAR). As indicated in Part II. E. of this Report and Decision, Transportation Planning Staff made such reviews and concluded that the proposed accessory apartment use would add one additional trip during each of the peak-hour weekday periods. Thus, the main dwelling and the accessory apartment will generate less than 3 peak hour trips which Technical Staff states has a “de minimus impact

according to the Adopted Subdivision Staging Policy 2012-2016.” Exhibit 39, p. 5. Since the existing dwelling, combined with the proposed accessory apartment, would generate fewer than 30 total trips in the weekday morning and evening peak hours, the requirements of the LATR are satisfied without a traffic study. For the same reasons, and because both uses on the property generate less than three peak-hour trips, Transportation Staff concluded that “the subject petition is not subject to the TPAR requirements of the [Adequate Public Facilities] APF test.” Exhibit 39, Attachment C. Based on this evidence, the Hearing Examiner concurs with Technical Staff and finds that the proposed use will be adequately served by the existing public services and facilities standard has been met. Therefore, the Hearing Examiner concludes that this standard has been met.

(C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: The only evidence in this case supports Transportation Staff’s finding that the proposed use “will not have an adverse effect on the transportation network [and will not] negatively impact pedestrian, bicyclist, or vehicular safety.” Exhibit 39, Attachment C. Technical Staff further noted that the addition of one vehicle to the neighborhood “will not have an adverse effect on the parking in the neighborhood.” Exhibit 39, p. 6. Based on the evidence of record, especially the availability of adequate on-street parking and the limited number of additional trips generated by the special exception, the Hearing Examiner concurs with Technical Staff and finds that the proposed use will not reduce the safety of vehicular traffic or to pedestrians or bicyclists in the neighborhood. *Id.*

C. Specific Standards

The specific standards for an Attached or Detached Accessory Apartment are found in

Code §§ 59-G-2.00.6 and 59-A-6.20. The record in this case provides adequate evidence that the specific standards would be satisfied, as outlined below.

Section 59-G-2.00.6. Attached or detached accessory apartment

A special exception may be granted for an attached or detached accessory apartment on the same lot as an existing one-family detached dwelling, subject to the special exception provisions of Division 59-G-1 and the standards and requirements of Section 59-A-6.20.

Conclusion: The testimony and exhibits of record, including the Technical Staff Report (Exhibit 39), provide sufficient evidence that the proposed use satisfies the special exception provisions of Division 59-G-1 and the specific standards and requirements for an attached accessory apartment required by Section 59-A-6.20 as described below.

Section 59-A-6.20. Attached or detached accessory apartment

- (a) *Where an attached or detached accessory apartment is permitted in a zone, only one accessory apartment is permitted for each lot and it is only permitted under the following standards:*
 - (1) *the apartment was approved as a special exception before May 20, 2013 and satisfies the conditions of the special exception approval; or*
 - (2) *the apartment is licensed by the Department of Housing and Community Affairs under Section 29-19 and*
 - (A) *the apartment has the same street address as the principal dwelling.*

Conclusion: The proposed accessory apartment will be located in the basement and will have the same address as the principal dwelling. DHCA denied Petitioner's application for a Class III Accessory Apartment Rental License because the property did not have a driveway and as a result could not meet the on-site parking requirements. As provided for in Section 59-A.6.20(b)(1), Petitioner filed an attached accessory apartment special exception petition to deviate from the on-site parking requirements in order to be granted a modified rental license. For the reasons stated below in Section 59-A.6.20(b)(1), the Hearing Examiner agrees with Technical

Staff and finds that there is adequate on-street parking to grant Petitioner's request to deviate from the on-site parking requirements.

(B) *a separate entrance is located:*

- (i) *On the side yard or rear yard;*
- (ii) *At the front of the principal dwelling, if the entrance existed before May 20, 2013; or*
- (iii) *At the front of the principal dwelling, if it is a single entrance door for use of the principal dwelling and the accessory apartment;*

Conclusion: The separate entrance to the accessory apartment will be located in the rear of the dwelling either under the covered porch (floor plan 1) or in the center of the dwelling under the deck stairs (floor plan 2).

(C) *one on-site parking space is provided in addition to any required on-site parking for the principal dwelling; however, if a new driveway must be constructed for the accessory apartment, then two on-site parking spaces must be provided;*

Conclusion: The 1933 existing two story one-family detached dwelling was constructed in without a driveway. Thus, there is no on-site parking and Petitioner is not proposing to construct a driveway. Based an on-site visit to the property, Technical Staff found that the construction of a driveway is not practical or feasible given the lot size, 50 foot lot width and placement of the existing dwelling. In Staff's opinion, the addition of a driveway under these circumstances would change the residential character of the neighborhood. Exhibit 39, p. 13. Petitioner's application for a Class III Accessory Apartment License was denied for this reason and as a result, Petitioner filed this special exception requesting approval to deviate from this parking standard as provided in Section 59-A-6.20(b)(1(A) of the Zoning Ordinance. For the reasons stated above in Part II. E, and as described below, the Hearing Examiner agrees

with Technical Staff and finds that construction of a driveway is not practical or feasible given the lot size, width and placement of the dwelling.

(D) *an attached accessory apartment:*

- (i) *In the RE-2C, RE-200, RMH-200, and R-150 zones is located at least 500 feet from any other attached or detached accessory apartment, measured in a line from side lot line to side lot line along the same block face;*
- (ii) *In the R-9, R-60, and RNC zones is located at least 300 feet from any other attached or detached accessory apartment, measured in a line from side lot line to side lot line along the same block face;*

Conclusion: The subject property is located in the R-60 Zone. Technical Staff reported there was one accessory apartment (BAS-1848- 6425 Broad Street) located 300 feet from the proposed use. As a result, Petitioner amended the Petition to request to deviate from the minimum distance requirements as provided in Section 59-A-6.20(b)(1)(B). Exhibit 25. However, based on updated records from the Board of Appeals, the special exception for an accessory apartment located at 6425 Broad Street was revoked as abandoned by the Board of Appeals by Resolution adopted February 6, 2013. Exhibit 56. Thus, the Hearing Examiner finds that there are no accessory apartments located less than 300 feet from the proposed use.

(E) *a detached accessory apartment:*

- (i) *In the RE-2, RE-2C, and RE-1 zones is located a minimum distance of 500 feet from any other attached or detached accessory apartment, measured in a line from side lot line to side lot line along the same block face;*
- (ii) *Built after May 20, 2013 must have the same minimum side yard setback requirement as the principal dwelling and a minimum rear yard setback requirement of 12 feet, unless more restrictive accessory building or structure yard*

- setback standards re required und Section 59-C-1.326;*
- (iii) *Must be located on a lot with an area of one acre or larger;*

Conclusion: Petitioners are seeking approval of an attached accessory apartment that will be located in the basement of an existing one-family dwelling. Therefore, this section is not applicable.

- (F)(i) the maximum gross floor area for an accessory apartment, including any floor area used for an accessory apartment in a cellar, must be less than 50 percent of the total floor area in the principal dwelling, including any floor area used for an accessory apartment in the cellar of the principal dwelling, or 1,200 square feet, whichever is less;*

Conclusion: According to the property tax records the existing two story one-family dwelling is approximately 2,506 square feet in size. Exhibit 18. DHCA reported the basement apartment is 580 gross square feet in size (Floor Plan 1). Exhibit 53(a). If Petitioner chooses to implement the modifications under Proposed Floor Plan 2, the new hallway (17'x3') will add approximately 51 square for a total of 631 gross square feet. Exhibit 53(b). Thus, the total floor area for the accessory apartment as proposed in both floor plans will be well below the maximum 50% of the total floor for the principal dwelling (2,506 square feet). Therefore, the Hearing Examiner finds that this standard has been met.

- (ii) The maximum floor area used for an accessory apartment in a proposed addition to the principal dwelling must not be more than 800 square feet if the proposed addition increases the floor plate of the principal dwelling;*

Conclusion: Petitioners are seeking approval of an attached accessory apartment that will be located in the basement of an existing one-family dwelling. Therefore, this section is not applicable.

- (G) *the maximum number of occupants is limited by Section 26-5; however, the total number of occupants residing in the accessory apartment who are 18 years or older is limited to 2.*

Conclusion: As a condition of approval, the maximum number of occupants will be limited to no more than 2 occupants. Petitioners confirmed their understanding and agreement to comply with this condition in an Affidavit dated November 23, 2013, and submitted into the record. Exhibit 2(c).

- (3) *an accessory apartment must not be located on a lot where any of the following otherwise allowed residential uses exist: guest room for rent; boardinghouse; registered living unit; or any other rental residential use; however, an accessory apartment may be located on a lot in an agricultural zone that includes a tenant dwelling, a farm tenant mobile home, or a guest house.*

Conclusion: As a condition of approval, Petitioner will extinguish the existing RLU (Registration No: 36324). Petitioners confirmed their agreement to comply with this condition in an Affidavit dated November 23, 2013, and submitted into the record. Exhibit 2(c).

- (4) *the one-family detached dwelling in which the accessory apartment is to be created to which it is to be added must be at least 5 years old on the date of application for a license or a special exception.*

Conclusion: According to the property tax records, the dwelling was constructed in 1933. Exhibit 18. Thus, the dwelling is more than 5 years old. The Hearing Examiner finds that this standard is met.

- (b)(1) *An attached or detached accessory apartment special exception petition may be filed with the Hearing Examiner to deviate from any permitted use standard regarding:*

- (A) *number of on-site parking spaces; or*
- (B) *minimum distance from any other attached or detached accessory apartments.*

Conclusion: Based on a referral from DHCA, the petition for a special exception to allow an attached accessory apartment and request to deviate from the on-site parking requirements was filed on June 27, 2014. Exhibit 1. Based on information from Technical Staff that there was an approved accessory apartment less than 300 feet from the subject property (BAS-1848), Petitioner amended the Petition and requested to deviate from the minimum distance requirement. Exhibit 25. As previously noted, updated records confirm that the accessory apartment located at 6425 Broad Street (BAS-1848) was revoked as abandoned by the Board of Appeals by Resolution adopted February 6, 2013, (effective date: April 8, 2013). Exhibit 56. Therefore, Petitioner's request to deviate from the minimum distance requirement provided in Section 59-A-6.20(b)(1)(B) is dismissed as moot.

(2) *To approve a special exception filed under Subsection (b)(1), the Hearing Examiner must find as applicable, that:*

- (A) *) adequate on-street parking permits fewer off-street spaces; or*
- (B) *when considered in combination with other existing or approved accessory apartments, the deviation in distance separation does not result in an excessive concentration of similar uses, including other special exception uses, in the general neighborhood of the propose use.*

Conclusion: Based on separate on-site visits, Technical Staff and Housing Inspector Steve Morris found that there was adequate on-street parking along both sides of Maryland Avenue to accommodate the main dwelling and accessory apartment use. Ms. Trippe testified that she and her husband have never had any problems parking their two vehicles in front of their property. Further, there is additional unrestricted on-street parking one block south of the proposed use along Broad Street. For the reasons stated in Part II.E of this Report, the Hearing Examiner finds there adequate on-street parking along both sides of Maryland Avenue to

accommodate the main dwelling and accessory apartment use. Therefore, the Hearing Examiner concludes there is adequate on-street parking to permit fewer on-street parking spaces.

(3) *The Hearing Examiner may find that on-street parking is inadequate if:*

- (A) *the available on-street parking for residents within 300 feet of the proposed accessory apartment would not permit a resident to park on-street near his or her residence on a regular basis; and*
- (B) *the proposed accessory apartment is likely to reduce the available on-street parking within 300 feet of the proposed accessory apartment.*

Conclusion: For the reasons stated above in the previous answer, the Hearing Examiner concludes there is adequate on-street parking and the proposed accessory apartment will not adversely affect or reduce the available on-street parking for residents located within 300 feet of the proposed use.

D. Additional Applicable Standards

Section 59-G-1.23. General development standards

- (a) ***Development Standards.** Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: The existing one-family dwelling was constructed in 1933 in accordance with 1928 Zoning Ordinance which required a minimum 50-foot lot width at the front building line and 7-foot side yard setbacks. The lot meets the minimum 50-foot width lot at the front building line standard. However, the dwelling has a side-yard setback of 10 feet on the north side and 6 feet on the south. As a condition of approval, Petitioners filed for a variance of one-foot from the seven-foot side yard setback from the Board of Appeals. The Board of Appeals (Case No.

A-6447) granted Petitioners' request for a variance of one-foot from the seven-foot side yard setback as required by Section III(c)3 of the 1928 Zoning Ordinance by Resolution adopted January 7, 2015. Exhibit 43. The following chart from the Technical Staff report demonstrates that the special exception complies with all development standards for R-60 Zone (Exhibit 39, p. 7):

Development Standards for the R-60 Zone		
Development Standards	Min/Max Required	Proposed
Minimum Lot Area	6,000 sq ft	6,000 sq ft
Minimum Lot width at street line	25 ft	25 ft
Minimum lot width at front building line	60 ft	50 ft ¹
Minimum Setbacks		
- front	25 ft	25 ft
- side	7/7 ft	10/6 ft ²
- rear	20 ft	24 ft.
Maximum Building Height	35 ft	27 ft
Maximum Building coverage	35%	16%
Maximum Floor area for accessory apartment	1,200 sq ft	531 sq ft

¹ The property was developed under the standards of the 1928 Zoning Ordinance which required a minimum lot width at the front building line of 50 feet. The existing dwelling unit remains in conformance with the 1928 standards.

² As noted above, the Applicant will need to obtain a variance from the Board of Zoning Appeals for one foot to meet the 1928 standards for side yard setbacks.

(b) ***Parking requirements.*** *Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: Zoning Code §59-A-6.20(b)(1)(A) permits the Hearing Examiner to waive the on-site parking requirements for special exception accessory apartment use based on a finding that there is adequate on-street parking to permit fewer on-site parking spaces. For the reasons stated in Part II.E of this Report and Decision, the Hearing Examiner finds that the evidence of record supports the conclusion that there is adequate on-street parking to permit fewer on-site parking spaces for the proposed special exception. Therefore, the Hearing Examiner finds that this standard has been met.

(c) ***Minimum frontage.*** * * *

Conclusion: Not applicable, since no new building is proposed.

- (d) **Forest conservation.** *If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: Not applicable. The property is exempt from the forest conservation requirements

of Chapter 22A of the Montgomery County Code. Exhibit 11.

- (e) **Water quality plan.** *If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: Not applicable. There is no evidence that the site is in a special protection area or that there is an approved preliminary water quality plan. Technical Staff indicated that there are no environmental or landscaping issues or concerns related to the proposed special exception. Exhibit 39, p. 6.

- (f) **Signs.** *The display of a sign must comply with Article 59-F.*

Conclusion: Not applicable. Petitioners did not propose any signs in this case.

- (g) **Building compatibility in residential zones.** *Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

Conclusion: The only external modifications necessary to accommodate the proposed use will be either the installation of an egress window on the above-grade brick foundation on the southeast corner of the dwelling (Floor Plan 1) or the enlargement of an existing window (rear center of dwelling under deck stairs) to create a second exterior door into a newly created hallway. The egress window is necessary for emergency escape from a bedroom and the exterior door is to provide access to the unit without going through a bedroom. For the reasons stated in Part II.C of this Report and Decision, the Hearing Examiner finds that the proposed modifications under either floor plan (Exhibits 53(a)-(b)) are compatible with and will not change the residential character of the dwelling or surrounding neighborhood. Therefore, the Hearing Examiner concludes that this standard has been met.

- (h) ***Lighting in residential zones.*** *All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*
- (1) *Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*
 - (2) *Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: Technical Staff found that the existing exterior lighting “is residential in character and will not create adverse impacts to adjacent residential developed properties.” Exhibit 39, p. 6. Given the sloping topography, existing landscaping and the residential character of the existing exterior lighting, the Hearing Examiner agrees with Technical Staff and finds that this standard has been met.

V. DECISION

Based on the foregoing findings and conclusions, Petition Case No. AA-14-05 for a special exception in the R-60 Zone to allow an accessory apartment in the basement of an existing one-

family detached home, at 4107 Maryland Avenue, Bethesda, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. The Petitioners are bound by their testimony, representations and exhibits of record, to the extent that such testimony and evidence are identified in this Report and Decision.
2. The Petitioners must occupy one of the dwelling units on the lot on which the accessory apartment is located.
3. The accessory apartment may not be located on a lot where there is a guest room for rent, a boarding house, a Registered Living Unit or any other residential rental use.
4. The Petitioners must extinguish the existing Registered Living Unit (Exhibit 4) with the Department of Housing and Community Affairs prior to issuance of a rental license for the accessory apartment use.
5. The total number of occupants residing in the accessory apartment who are 18 years or older is limited to two.
6. The Petitioners must comply with the conditions set forth in the Memorandum of Ivan Eloisa, Housing Code Inspector, Division of Housing and Code Enforcement (Exhibit 42):
 1. Bedrooms shall not constitute the only means of access to other bedrooms or habitable spaces and shall not serve as the only means of egress for other habitable spaces.
 2. The minimum total glazed area for every habitable space shall be 8 percent of the floor area of such room.
7. The Petitioners must modify the accessory apartment as specifically proposed in either Proposed Floor Plan 1 (Exhibit 53(a)), or Proposed Floor Plan 2 (Exhibit 53(b)). Under either Floor Plan, Petitioners must obtain the necessary approval and building permits from Department of Permitting Services for the modifications to either install an egress window or enlarge an existing window to create a second exterior door into the new hallway.
8. If Petitioners choose to modify the accessory apartment as shown in Proposed Floor Plan 1 (Exhibit 53(a)), Petitioners must install an egress window meeting the requirements of all applicable codes and regulations.
9. If Petitioners choose to modify the accessory apartment as shown in Proposed Floor Plan 2 (Exhibit 53(b)), Petitioners must provide a porch light for the second exterior door or position an existing exterior light under the deck to provide the required lighting for an accessory apartment entrance.

10. The Petitioners must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated June 5, 2015

Respectfully submitted,



Tammy J. CitaraManis
Hearing Examiner

Any person, board, association, corporation or official aggrieved by a decision of the Hearing Examiner under this section may, within 10 days after the decision is rendered, appeal the decision to the County Board of Appeals, which must review the decision as an administrative appeal based on the record compiled by the Hearing Examiner. The Board may hear oral argument on the record. The oral argument, if granted, must not take place sooner than 30 days after the notice of filing of the appeal is mailed under Section [59-A-4.46](#). The Hearing Examiner must comply with the prehearing submission requirements of Chapter 2A. The Board, after considering the evidence of record, may affirm, reverse, or modify the Hearing Examiner's decision or remand the matter for further proceedings.

Cc:

Kelly A Trippe & Steven D. Aitken
Planning Department
Parties of Record

Appendix

SUMMARY OF HEARING

January 30, 2015 Hearing:

This is a summary of the limited testimony (under oath) by Ms. Trippe and Mr. Eloisa before the hearing was continued at Petitioner's request.

Ms. Trippe testified that she applied for a Class III Accessory Apartment license on November 24, 2013. DHCA denied the application for lack of on-street parking (no driveway) in a letter and Notice of Referral to OZAH dated December 13, 2013. Ms. Trippe filed a Petition for a special exception for an accessory apartment and requested a waiver of the on-site parking requirements with OZAH on June 27, 2014. Technical Staff subsequently advised Ms. Trippe that her property did not meet the minimum side yard setback per the 1928 Zoning Ordinance and that there was an approved accessory apartment located less than 300 feet from the proposed use. As a result, Petitioner amended her Petition to request a waiver of the minimum distance requirement and filed for a variance of one-foot from the seven-foot side yard setback. She reported that the Board of Appeals granted her request for a variance on January 7, 2015. T. 5-6.

Petitioner submitted an Affidavit of Posting and agreed to submit a notarized Affidavit from her husband and co-owner of the property, Steven D. Aitken. Ms. Trippe testified that she received and reviewed the Technical Staff report dated January 2, 2015 (Exhibit 39), and accepted and adopted the findings and conclusions as her own evidence and agreed to comply with the conditions of approval. T. 6-11.

Ms. Trippe received a copy of the housing inspection report from Mr. Eloisa just prior to the hearing and was unaware that the existing floor plan (Exhibit 15) required modification because access to the unit's living space is through the bedroom. Exhibit 42. In response, Mr. Eloisa explained that while the door served as the required emergency egress for a bedroom

use, it cannot be the only access to the unit. Ms. Trippe stated that this issue was never raised by DHCA when the unit was inspected for renewal of the RLU license. Mr. Eloisa explained the license renewals were for a continued use of the RLU and an accessory apartment is considered a change in use and occupancy from a RLU (family member) to an accessory apartment (tenant). This accessory apartment use is considered a business that is regulated. Further, he noted that the building code regulations have changed since the RLU was first approved in 1992. Thus, the floor plan for the accessory apartment must comply with the new building code regulations which prohibit exterior access through a bedroom. T. 12-20.

In order to provide sufficient time to consider her options, Petitioner's request to continue the hearing until February 26, 2015, was granted. Petitioner agreed to submit a modified floor prior to the hearing. Exhibit 42. T. 21-26.

March 23, 2015 Hearing:

1. Petitioner - Kelly Trippe:

Ms. Trippe was sworn in and testified in support of the Petition. She submitted an Affidavit from her husband and co-owner of the property, Steven D. Aitken and alternate modified floor plans consistent with the January 29, 2015, housing inspection report. (Exhibits 52 and 53(a)-(b)). Ms. Trippe confirmed her prior testimony on January 30, 2015, that she accepted and adopted the findings and conclusions in the Technical Staff report dated January 2, 2015 (Exhibit 39) and agreed to comply with the conditions of approval. T. 7. Petitioner testified that her son currently lives in the unit and their intent is to maintain the unit for short-term rentals and to accommodate visiting scholars, artists and other guests to their home. T. 16-18.

Ms. Trippe testified that parking on both sides of Maryland Avenue is unrestricted and

does not require a permit. She and her husband are able to park in front of their house without any problems. The neighbors to the north (towards MacArthur Boulevard) and across the street from her home have on-site parking (garage and driveway). As a result, there are only five homes on the block that do not have a driveway and regularly park on the street. The two neighbors to the north have dedicated parking in the rear of their homes which is accessed by an unpaved road that goes behind their properties and provides access to the parking area for the recreation center to the rear of the properties. Petitioner's guests have parked in this area and used the backyard gate to access their home. The neighbors to the south of her property do not have a driveway and park on the street without problem. There is plenty of unrestricted street parking one block to the south along an area identified by the neighborhood as "the green area" or open space that extends a quarter of mile in either direction along Broad Street. This provides the neighborhood with plenty of parking to accommodate overflow parking for events or resident parking during scheduled roadwork. T. 9-12.

Ms. Trippe testified that the first floor plan (Exhibit 53(a)) proposes to reverse the use of the two rooms as shown on the original floor plan submitted with the Petition (Exhibit 15). The larger room to the rear of the apartment will be used as the bedroom and the smaller room with the exterior door will be used as the "Sitting Room." As required, an egress window will be installed through the above-grade brick foundation in the bedroom. The existing exterior door will provide the required egress to the unit. The second floor plan proposes to maintain the original floor plan with the addition of a hallway and second exterior door. Exhibit 53(b). Space for the hallway will be taken from the workshop area and the second exterior door will be created by enlarging an existing full-size window located in the center of the dwelling and under the deck stairs. Ms. Trippe stated that ductwork in the workshop area was being

reconfigured to accommodate installation of a new furnace. As a result, she does not believe there will be an issue with the new hallway complying with the minimum ceiling height requirements for the unit. Petitioner indicated that she prefers floor plan 2 (Exhibit 53(b)) based on advice from her builder that it will be less expensive and easier to complete than the changes proposed under the first plan. Prior to construction under this plan, Petitioner was advised to confirm with the housing inspector that the minimum ceiling height requirements for the hallway will be met. T. 12-18 and 20-22.

Ms. Trippe modified the Landscape Plan (Exhibit 12) to show the location of the flagstone walkway along the south side to the rear patio and separate entrance to the accessory apartment. The exterior lighting includes a porch light at the separate entrances to the main dwelling and accessory apartment and five motion sensor lights mounted on the sides and rear of the dwelling and under the deck. (Exhibit 12). T. 24-27.

Ms. Trippe identified the interior and exterior photographs of the property and surrounding area submitted with the Petition. Exhibits 16-17. She testified that the photographs were taken at various times of the day in early 2014 and they accurately depict the condition of the property and proposed unit as it currently exists. The existing exterior door into the accessory apartment is shown in Exhibit 17(a). The existing window that will be enlarged to create a second exterior door proposed under the second floor plan is located to the right of the existing exterior door and under the deck steps. The patio is slightly elevated (one step up) from the area in front of the existing exterior door. T. 28-31.

2. Housing Code Inspector - Steve Morris :

Mr. Morris testified on behalf of DHCA in place of Mr. Eloisa who could not attend the hearing. Mr. Morris testified that while he was not present during the January 29, 2015,

inspection, he confirmed that he reviewed and was fully aware of the issues raised in the inspection report prepared by Mr. Eloisa. T. 5. However, he testified that he drove by the property prior to the hearing. Based on his observation, he concluded that there is adequate on-street parking to accommodate the accessory apartment without affecting the available on-street parking for residents within 300 feet of the accessory apartment. T. 31

Mr. Morris testified that both floor plans as proposed will meet the applicable building code requirements for an egress window or hallway. He noted that the hallway proposed under the second floor plan complies with the minimum 3 foot width required by code. He informed Petitioner that smoke detectors must be installed outside the bedroom. He will submit the two plans for Mr. Eloisa's review and comment. Mr. Morris found the exterior lighting shown on the Landscape Plan (Exhibit 12) provides the required illumination for the walkway and either exterior door to the accessory apartment as shown on both floor plans. T. 18-23, 26-27.